

# Unmanned & unregulated: where are the privacy protections from drones?

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The use of drones for personal, commercial or government pursuits has grown rapidly in recent years, and yet the Australian legal framework has so far failed to keep pace. While the Civil Aviation Safety Authority ('CASA') regulates the use of drones in terms of aviation safety, its powers do not extend to other key issues such as privacy and insurance.

## The regulation of personal information (privacy)

Despite the number of concerns raised about the erosion of privacy through the use of drones – including the Privacy Commissioner's own concerns – lawmakers have not addressed this issue.

Privacy is regulated at a federal level. The *Privacy Act* generally applies to Commonwealth government agencies and businesses with an annual turnover of \$3 million or more ('covered entity'). It regulates how those entities collect and handle personal information – being information about an identified or identifiable individual. Personal information includes images of a person where the person is recognisable. Subject to limited exceptions, if you are not a covered entity or a State government agency covered by State privacy laws, there are no specific obligations in relation to your collection and handling of personal information. Subject to some criminal laws and laws in relation to surveillance, you can collect anyone's personal information and use it for any purpose. Naturally, this gives cause for concern when it comes to the rapid uptake of drone technology by small businesses and individuals.

## The regulation of surveillance

Surveillance is regulated inconsistently across Australia, with different laws in each jurisdiction.

New South Wales' surveillance laws are relatively comprehensive, regulating the use of listening devices, optical surveillance devices, tracking devices and data surveillance devices, which monitor information to and from a computer. Conversely, Queensland's surveillance laws only apply to listening devices that record private conversations. There are no laws relating to visual recording devices or location trackers. The privacy and surveillance issues

## Snapshot

- The use of drones for personal, commercial and government pursuits is increasing rapidly with advances in technology and accessibility.
- With the growth in opportunities that drones present comes rising concerns about safety, privacy and surveillance.
- Australia was one of the first countries to introduce drone-specific regulations, however these laws regulate drone usage from a safety perspective only. There remains a gap between the public expectation of protection of privacy and the legal reality.

for drone usage relate to capturing video footage or still images. This is pertinent as drones can view scenes from viewpoints previously inaccessible – the fence that previously afforded some privacy is no barrier to a drone, and an apartment several stories high can be reached 'at eye level' by a nimble flying device.

Currently, visual recording devices are dealt with in the surveillance laws of five jurisdictions (not including workplace-specific legislation): New South Wales, South Australia, Victoria, Western Australia, and the Northern Territory, leaving individuals in Queensland, the Australian Capital Territory and Tasmania without legal protection.

Even in jurisdictions that have surveillance laws regarding visual recording devices, these may not be adapted to drone

surveillance. For example, New South Wales' laws on the use and maintenance of optical surveillance devices only regulate the use of such devices 'within premises or a vehicle or on any other object' and the use of such devices to capture a private conversation. These categories generally would not apply to the outdoor use of drones.

Further, criminal laws prohibiting stalking do not protect individuals from ad hoc interferences of privacy, where the repeated nature of stalking cannot be established.

## Gaps in the Australian legal framework

Last year, the case of the woman skinny dipping in the privacy of her backyard in the Northern Territory who was captured by an unidentifiable drone is but one case that attracted calls for drone users to be prevented from taking footage of individuals.

In 2012 the Privacy Commissioner flagged that a statutory cause of action for privacy could address the gap for privacy and surveillance issues associated with drones. Such a statutory entitlement would give an individual the right to take action in relation to an invasion of their privacy. This statutory cause of action would fill the place of a common law tort of privacy, which remains unrecognised by Australian courts. However there has been no legislative progress towards a statutory cause of action. The gap remains unfilled.

## International perspective

### New Zealand

In New Zealand, laws protecting an individual's privacy from drones (and any other device which may record their personal data without consent) are already in place. While New Zealand's Privacy Principles are similar to Australia's, they apply to any person or body of persons, incorporated or not, with few exceptions.

There are also laws against the making of, possession, publishing, importing, exporting or selling of 'intimate visual recording' without the knowledge or consent of the person the subject of the recording, and of peeping or peering into another person's home at night and without a reasonable excuse.

### Europe

General privacy protection in Europe is governed by the European Union ('EU') *General Data Protection Regulation*.

In response to advances in development of lightweight drones, the EU's competence was extended to cover all civil unmanned aircraft systems ('UASs'), regardless of their maximum take-off mass. The European Aviation Safety Agency ('EASA') published its first Opinion to the European Commission on safe drone operations in Europe providing a framework for the EASA Member States to develop their own (harmonised) regulations for the safe operation of all civil UASs while allowing the 'industry to remain agile, to innovate and continue to grow'.

The key proposals include: (a) mandatory registration for UAS operators who conduct operations with a drone that poses a security, privacy or environmental risk or are certified; (b) electronic identification of all UASs; (c) availability for Member States to create zones within their territories where the use of UAS would be prohibited, limited or, in contrast, facilitated for security and/or privacy reasons; (d) remote pilot competency requirements for UAS operators which include knowledge of the relevant EU and national security and privacy/data protection regulations.

The European Commission is expected to form its decision before March 2019.

### United States

Since 2015, the US has had a mandatory registration for recreational and commercial use of drones enforced by the Federal Aviation Administration ('FAA'). The FAA is in the process of further developing national drone regulations and has been subject to considerable criticism from State governments and lobbyist groups for lack of consultation. Lobbyist group, the Electronic Privacy Information Centre, has brought numerous complaints including bringing an action against the FAA in 2012 for failing to issue privacy regulations in the interests of the safety of the American public. On 27 April 2018, the *FAA Reauthorization Act* was passed in the House and is now being considered by the Senate.

The Act directs the Secretary of Transportation (in consultation with other agencies and experts) to undertake a review to 'identify potential reduction of privacy specifically caused by the integration of unmanned aircraft systems into national airspace system'.

## Australian developments on the horizon

### Senate Committee Inquiry

In 2016 the Senate moved that there be an inquiry into the regulatory requirements that impact safe use of drones. The Committee's report was due to be handed down by 27 April 2017, however this was extended to 31 July 2018. The Inquiry aims to introduce regulations balancing the innovation and growth of drone usage with the safety and protection of all airspace users, including as regards privacy.

### CASA Discussion Paper

In 2017, CASA initiated a discussion for its own drone safety review and sought input from the community and industry on matters including drone registration, proficiency in safe and lawful operation of drones, geo-fencing and counter-drone technologies.

CASA published its discussion paper in December 2017. The key findings were that: mandatory drone registration is mostly supported; support for mandatory geo-fencing of certain areas is divided; training for drone operators and demonstration of their proficiency was broadly supported; and there was support for the use of counter-drone technology by law enforcement.

### CASA Regulatory Roadmap

On 26 April, CASA announced that it 'is developing a remotely piloted aircraft systems regulatory roadmap to give the drone industry more certainty about the safety regulation of the sector into the future'. Among other topics, it identified 'low cost automatic dependent surveillance-broadcast technology' and 'registration and e-identification' as focuses for its vision of drone regulation going forward.

### Local Governments taking own measures

In 2015, Leichhardt City Council was the first council to prohibit drones from all public parks and playground. In more recent months, various other councils have flagged enacting local legislation in relation to flying drones in parks and roads. The Ballarat City Council recently voted to introduce a law that would require every drone user (whether commercial or hobbyist) to obtain a council permit to fly drones on municipal land or roads. Such legislation is a step towards ensuring that personal privacy is protected.

## Conclusion

There seems to be increasing pressure from the Australian public to address the privacy issues arising from the use of drones. CASA intends, in respect of drone regulation, to be 'a fast-follower of international developments so that CASA and Australia does not lag other countries'.

Whilst it's unlikely that a statutory right to privacy will be introduced, it may well be that mandatory registration for recreational and commercial drone operators is the first step. Together with any legislation enacted by local councils, mandatory registration would be an important aid in the identification of drones and enforcement of any future privacy laws that may follow. **LSJ**